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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 160

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
an unincorporated association,
Petitioner,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY,
a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit.

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BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
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CENTRAL OF GEORGIA RAILWAY COMPANY,
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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit.

Petitioner, Brotherhood of Locomotive Firemen and Enginemen, prays that a writ of certiorari issue to review the judgment entered in this cause by the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court of the United States for the Northern District of Georgia, Atlanta Division.*

* The Court of Appeals noted in the first paragraph of its opinion that three cases were consolidated by the district court and that the appeal consisted of three separate law suits "two of which, BLE and BLF&E v. Central of Georgia Railway Company, differ so materially from the third, Switchmen's Union v. Central of Georgia and Southern Railway Company, that the cases must be considered separately." This petition for a writ of certiorari seeks review of the decision of the Court of Appeals as it relates to the separate cause of action asserted by Brotherhood of Locomotive Firemen and Enginemen (BLF&E) against Central of Georgia Railway. The record filed herewith is that made in the consolidated cases.

OPINIONS BELOW.

The opinion of the District Court is not officially reported; it and the order of dismissal are reproduced at pages 401-409, 418 of the Record. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 341 F. 2d 214, and is reproduced at pages 20-27 of the Appendix to this petition.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the Court of Appeals sought to be reviewed was dated and entered February 2, 1965 (Appendix, p. 27). A timely Petition for Rehearing was denied by order entered and dated March 5, 1965 (Appendix, p. 28). The statutory provision believed to confer jurisdiction on this Court is 28 U. S. C., Section 1254.

QUESTIONS PRESENTED FOR REVIEW.

1. Under circumstances where a carrier by railroad has sought and received approval and authorization from the Interstate Commerce Commission to only acquire control of another carrier by railroad through ownership of its stock, pursuant to an application filed under the Interstate Commerce Act (49 U. S. C., Section 5(2)(a)), may the railroad of which control has been acquired abandon all or a portion of its yard switching facilities, cease operation thereof, and permit their operation and control by the acquiring railroad without first obtaining authority for such actions pursuant to an application made under Section 1, paragraph 18 (49 U. S. C., Section 1 (18)) of the Interstate Commerce Act?

2. Does the acquisition of stock control of one carrier by railroad of another carrier by railroad, pursuant to approval of the Interstate Commerce Commission, authorize the acquired carrier to cease performing the yard switching functions which it customarily performed at its major terminals, by transferring its yard switching facilities to the parent carrier and then terminating *en masse* the employment of its yard switching crews who worked under collective agreements which contained rules that assured employees the right to select and hold jobs on the basis of seniority and other employment rules such as are customarily contained in collective agreements governing rates of pay, rules, and working conditions applicable to the operating crafts?

STATUTES INVOLVED.

The statutes involved are the Railway Labor Act (45 U. S. C., Section 151, *et seq.*), the pertinent portion of which is printed in the Appendix hereto at page 31; and the Interstate Commerce Act (49 U. S. C., Section 1, *et seq.*), the relevant provisions of which are printed in the Appendix at pages 28, *et seq.*

STATEMENT OF CASE.

On December 15, 1960, the Southern Railway filed an application under Section 5(2) of the Interstate Commerce Act (Finance Docket No. 21400, 317 I. C. C. 557, 317 I. C. C. 729) requesting the Interstate Commerce Commission to approve the acquisition by it of control of Central of Georgia Railway Company through the purchase of Central of Georgia Railway's capital stock (R. 173). The application was granted by a report dated November 7, 1962 (the report of the Commission in Finance Docket No. 21400 may be found at R. 172, *et seq.*). In an order served December 5, 1962, the Commission stated "it is * * * ordered, that, * * * the acquisition by the Southern Railway Company of control of the Central of Georgia Railway Company and of the latter's common carrier subsidiaries, through ownership of a majority of the capital stock of the Central of Georgia Railway Company, in the manner and upon the terms and conditions in the report aforesaid found just and reasonable, be, and it is hereby, approved and authorized" (R. 243).

The *only* transaction for which Commission approval was sought was the acquisition of control of Central of Georgia Railway by Southern Railway through ownership of stock. The application of Southern Railway did not pray for such authorization as to consolidate or merge properties or franchises, or to purchase, lease or contract to operate

any part of the properties of Central of Georgia, or to acquire trackage rights over, or joint use in or joint use of, any railroad line or lines of Central of Georgia. While Central of Georgia was an intervener, along with some other carriers, in the Commission's proceedings, it neither sought nor obtained approval and authorization of any transaction. Stated in another way, the Commission order did not authorize Central of Georgia to do anything; Central of Georgia did not secure authority to abandon any portion of its railroad or the operation thereof, or to permit any railroad to acquire or operate any line of its railroad. The report of the Commission recited that "Central and its subsidiaries and affiliates, under control of Southern, would continue to be operated separately within the controlling carrier's system" (R. 215).

Subsequent to issuance of the Commission's order, to-wit, on June 17, 1963, respondent Central of Georgia Railway and Southern Railway issued bulletins applicable to yard operations in Atlanta, Georgia, Macon, Georgia, and Chattanooga, Tennessee, of which the following dealing with yard operations at Atlanta is illustrative (R. 31):

> "Effective today the yard and terminal operations of Central of Georgia at Atlanta are consolidated with that of Southern Railway and will constitute one (1) common seniority district.
>
> "Employees presently holding regular assignments on the Central of Georgia and those only, will become employees of the Southern Railway and will be covered by the rules and working conditions agreement between Southern and its employees of those same classes."

Petitioner thereupon filed its complaint in the District Court of the United States, Middle District of Georgia, Macon Division, praying that Central of Georgia Railway

be enjoined from violating the Railway Labor Act, from conducting its operations under the terms of the aforesaid bulletins, and that the bulletins be required to be cancelled (R. 43). Petitioner invoked the jurisdiction of the District Court under the provisions of the Railway Labor Act and Sections 1331 and 1337, 28 U. S. C. The cause was subsequently ordered transferred to the United States District Court for the Northern District of Georgia, Atlanta Division (R. 70).

The complaint alleged (R. 36) that the bulletins had the effect of changing rates of pay, rules, and working conditions of the firemen's and hostlers' craft represented by petitioner under collective bargaining agreements in violation of the Railway Labor Act. Central of Georgia filed a motion to dismiss the complaint. Affidavits were filed and were considered by the District Court in connection with the application for a preliminary injunction and the motion to dismiss.

Effective June 17, 1963, all Central of Georgia jobs in the mentioned yards were abolished and the terminal work formerly performed by Central of Georgia employees in those yards was transferred to the Southern Railway Company; petitioner's collective bargaining agreement covering Central of Georgia employees serving as firemen and hostlers in the aforementioned yards was no longer regarded by the railway as effective, and the collective bargaining agreements on Southern Railway, which are different in character and content from the agreement on the Central of Georgia, were applicable to such of them as were allowed to enter the service of Southern Railway. The bulletin quoted above, it is to be noted, ordered that the specified employees of Central of Georgia "will be covered by the rules and working conditions agreement between Southern and its employees of those same classes."

The effect of the bulletins and orders of Central of Georgia Railway upon its locomotive firemen and hostlers may be illustrated additionally as follows: Prior to issuance of the bulletins the employees of Central of Georgia represented by petitioner held seniority rights entitling them to claim work assignments in both yard service and road service. By applying the rules of Southern Railway, as provided in the bulletins, such employees would no longer be able to select work assignments either in road or yard service but would be required to elect between the two services.

Prior to issuance of the bulletins some Central of Georgia employees were listed on the "extra board." From their positions on the extra board these employees were called to work when the number of employees available for and holding regularly assigned jobs was insufficient to fill the regular jobs. By the terms of the bulletins the extra board was abolished and the employees listed thereon were not permitted to claim assignments to which their seniority entitled them, the work formerly being done by the extra men on Central of Georgia Railway being thereafter performed by Southern Railway employees. A substantial number of Central of Georgia employees represented by petitioner were deprived of work (R. 41).

Work performed by Central of Georgia employees on Central of Georgia tracks with Central of Georgia equipment was, following issuance of the bulletins, performed by Southern Railway employees and under direction of Southern Railway officials. Thus the Central of Georgia abandoned its yard switching operations in the aforementioned terminals, ceased further operations at those points, and permitted their operation and control by Southern Railway.

Such Central of Georgia employees as were able to retain employment suffered reductions in pay ranging from $170.00 to $300.00 per month (R. Vol. III, 35, 40). In short, the bulletins changed rates of pay, rules, and working conditions of Central of Georgia employees in contravention of fourteen separate provisions of the collective bargaining agreement between petitioner and Central of Georgia Railway (Affidavit of A. B. Healan, R. Vol. III, 43).

By order of August 30, 1963, the District Court held that petitioner herein was not entitled to injunctive relief and dismissed the complaint subject to leave to amend (R. 401). When no amendment was proffered, a final order of dismissal of the complaint was entered September 11, 1963 (R. 418).

On petitioner's appeal the United States Court of Appeals for the Fifth Circuit affirmed (Appendix, pp. 27-28). A timely petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals Has Decided Important Questions of Federal Law Involving the Interpretation and Administration of the Interstate Commerce Act and Railway Labor Act Which Should Be Settled by This Court.

This is a case of first impression and of exceptional importance in the railroad industry. Transactions between railroads in the nature of mergers, coordinations, acquisition of control through ownership of stock, as well as others, are mounting in number. The policy of the Interstate Commerce Commission in recent years has been to approve such transactions under the provisions of Section 5(2), 49 U. S. C. The adverse impact of the shrinking railroad plant consequent to such approval upon the employment of railroad workers is a matter of public knowledge. The effect on the railroad physical and financial structure is profound. Hence the proper interpretation and application of the Interstate Commerce Act and Railway Labor Act in this area present questions of national scope and significance.

The complaint filed by petitioner alleged, in substance and essence, that the closing of yards by the Central of Georgia Railway at Atlanta and other terminals, and the transfer by Central of Georgia of its normal yard work to the Southern Railway, and the consequent furloughing and discharging of Central of Georgia yard employees in the face of a collective bargaining agreement under which these employees hold seniority rights constitute an unlawful violation or repudiation of the collective agreement. Accordingly it was prayed that the bulletins or orders through which these results were accomplished be cancelled and that the Central of Georgia be enjoined from

violating the Railway Labor Act under the aegis of which the collective bargaining agreements were consummated (R. 43).

As stated by the Court of Appeals, "The appellee, Central of Georgia Railway Company, defends its conduct * * * on the ground that this was authorized by the I. C. C. order itself." Although not pleaded in the complaint, the order of the Commission from which quotation was made under "Statement of the Case," *supra*, was introduced in evidence in support of Central of Georgia's motion to dismiss and the Court of Appeals in its opinion apparently regarded the order of the trial court dismissing the complaint as an order of dismissal "on motion for summary judgment in accordance with Federal Rules of Civil Procedure Rule No. 12(b)."

The arrangement consummated between Central of Georgia and Southern Railway was not the transaction approved by the Interstate Commerce Commission. The Commission approved Southern's acquisition of control through ownership of stock. The Commission did not authorize Southern to acquire or operate any portion of Central of Georgia Railway nor did it authorize Central of Georgia to abandon any portion of its railroad or the operation thereof. And petitioner submits that the arrangement between the two railroads which eventuated in the abandonment of yards by the Central of Georgia Railway and transfer of its yard work to Southern Railway cannot be lawfully accomplished without Central's first applying for and obtaining approval from the Interstate Commerce Commission.

Whether the arrangement between the railroads be regarded as a consolidation or merger (as the Court of Appeals characterized it), or as an abandonment of all or portion of a line of railroad or the operation thereof, the

arrangement or transaction between Southern and Central must be regarded as unlawful and the effects sought to be imposed on the employees as a result thereof must likewise be regarded as unlawful and hence susceptible to being set aside on application for an injunction on behalf of employees. The arrangement, irrespective of which nature it partakes as mentioned in the preceding sentence, is unlawful because it did not receive approval and authorization from the Interstate Commerce Commission as we will now demonstrate.

The proceeding pursuant to which Southern Railway was authorized to acquire a majority of Central's capital stock was instituted under Section 5(2) of the Interstate Commerce Act (49 U. S. C., Section 5(2)) (Appendix, pp. 29-30). Section 5(2)(a) provides that it shall be lawful "with the approval and authorization of the Commission" for a carrier to undertake six different kinds of transactions, one of which is the acquisition of control by one carrier of another through stock ownership. Specifically, the Commission may grant approval and authorization—

> 1. "For two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management and operation of the properties theretofore in separate ownership;"
>
> 2. "For any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another;"
>
> 3. "For any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise;"
>
> 4. "For a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise;"

5. "For a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or"

6. "For a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

These provisions of the Interstate Commerce Act recognize the distinction of each of the six enumerated sorts of transactions from the other. Plainly a transaction involving acquisition of control through stock ownership is in a distinct and separate category, on the one hand, from consolidations or mergers, for example, on the other hand. The primary and clear implication and effect of Sec. 5(2) is that none of the transactions therein described may be lawfully accomplished unless approval and authorization are first obtained. It is equally clear, we believe, that the grant of authority to effectuate one of the described transactions does not imply a grant of permission to consummate another of the described transactions (or a claimed related or derivative transaction) not specifically authorized.

Merger, consolidation, or abandonment of railroad yards in such communities as Atlanta, Macon, and Chattanooga manifestly would be a large scale activity. Southern Railway doubtless was convinced of the accrual of definite financial advantages if it should take over switching functions from Central at some of its main terminals. But we submit that Section 5(2) contemplates as a prerequisite to procuring permission for such a material change in operations the making of a specific application therefor accompanied by a detailed showing during hearings of effects on the public service rendered by carrier,

and of effects on employees. Evidence to support approval of one transaction may be quite different from that required to support another. Individuals who might not object to one transaction might object to another. To permit approval of one transaction and execution of another would be unjust and unfair. Should the application be for a merger or consolidation it must be clearly identified as such. Southern's application lacked that essential identification. Thus, if the arrangement consummated was a consolidation or merger, as indicated by the Court of Appeals, it was unlawful absent specific approval and authorization by the Interstate Commerce Commission.

In the event the transaction between Central of Georgia and Southern is regarded as an arrangement whereby Southern was to acquire or operate a line of railroad not its own, or an abandonment by Central of Georgia of a portion of its line of railroad or the operation thereof, the transaction is likewise unlawful, because of prohibitions contained in Section 1(18) of the Interstate Commerce Act, which reads as follows (with certain omissions):

> "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad. * * * *or shall acquire or operate any line of railroad.* * * * unless and until there shall first have been obtained from the Commission a certificate * * *, and no carrier by railroad subject to this chapter *shall abandon all or any portion of a line of railroad, or the operation thereof* unless and until there shall first have been obtained from the Commission a certificate. * * * Nothing in this paragraph or in Section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership, or the joint use of spur, industrial, team, switch or side tracks." (Emphasis ours.)

No certificate has, of course, been obtained by Southern to acquire or operate any of Central's line of railroad. Nor has Central of Georgia obtained a certificate permitting it to "abandon all or any portion of a line of railroad or the operation thereof." To repeat, Central has not been authorized to do anything by the Commission.

This Court has held that relocation of yard facilities and tracks to form a joint terminal to be used by several railroads cannot be brought about by voluntary action of the carriers in the absence of a certificate from the Interstate Commerce Commission. *Railroad Commission of the State of California v. Southern Pacific Company*, 264 U. S. 331. The decision of the lower court insofar as it implicitly holds valid the arrangement between Central and Southern is in conflict with the applicable decisions of this Court.

For the reasons stated above which we believe are particularly pertinent to the first question we submit that the decision of the Court of Appeals should be reviewed by this Court.

The decision of the Court of Appeals ought also to be reviewed because under authority granted to Southern to acquire its stock, Central of Georgia ceased to perform yard switching functions at major terminals, transferred its yard switching facilities and the operation thereof to Southern and terminated the employment of, and applicability of collective bargaining agreements to, employees who worked under the agreements which contained rules that assured the right to select and hold jobs on the basis of seniority and other employment rules usually contained in collective bargaining agreements concerning rates of pay, rules and working conditions applicable to operating craft employees.

The complaint alleges that petitioner and Central of Georgia Railway are parties to a schedule agreement, negotiated under the Railway Labor Act, and that the railway by its issuance of bulletins and operations thereunder has acted in violation of the Railway Labor Act (R. 38, 39). The terms of the bulletins and their effects upon the employees have been discussed *supra*. The sum of Central's conduct is that it has abrogated its collective agreement with the employees represented by petitioner.

It is to be assumed that irrespective of the kind of arrangement made between Central of Georgia and Southern Railway, that arrangement could not set aside an agreement made under the Railway Labor Act but for the possible effect, in an appropriate case, of Section 5(11) of the Interstate Commerce Act. That section contains the following provision (Appendix, pp. 30-31):

> "and any carriers or other corporations, and their officers and employees and any other persons, particularly in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *."

In this case, as we have repeated, Central neither applied for nor received any authority from the Interstate Commerce Commission under this section. It did not endeavor to secure authority to make available Section 5(11) as a source of authority for escaping from its contractual obligations with its employees. Since Central of Georgia made no application under Section 5(2) and received no grant of authority under it, Central may not invoke the provisions of Section 5(11).

The Railway Labor Act charges respondent Central of Georgia with the duty of making and maintaining agreements with its employees. Section 2, First of the Act (45 U. S. C., Section 2, First) provides in part:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions * * *."

Central of Georgia's failure to maintain its agreements with petitioner and its employees is thus a violation of a positive duty enjoined by law upon respondent. This Court has by the process of injunction required the fulfillment of similar positive duties imposed by the Railway Labor Act. In *Virginian Railway Co. v. System Federation No. 40,* 300 U. S. 515, it affirmed an injunction commanding the railway to treat with its employees as required by Section 2, Ninth. In *Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, the Court upheld a decree giving effect to the general duties prescribed by Section 2, Third, of the Act and restraining the railroad from interfering with, influencing or coercing its clerical employees in the matter of their organization and designation of representatives. On strength of these authorities and their rationale, and the decision in *International Association of Machinists v. Central Airlines, Inc.,* 372 U. S. 956, the courts below should have granted the injunction prayed for by petitioner.

The proceedings before the Interstate Commerce Commission after the remand contemplated by this Court's order in *Railway Labor Executives' Association v. United States, et al.,* 379 U. S. 199 (December 7, 1964), will not dispose of the questions presented for review by this petition for a writ of certiorari.

The Court will recall that the action in that case was instituted before a three-judge district court to set aside the reports and orders of the Interstate Commerce Commission entered on November 7, 1962, on December 3, 1962, and on June 16, 1963, in Finance Docket No. 21400, insofar as they related to conditions imposed for the benefit of employees in connection with the issuance of the order by the Commission approving the application of Southern Railway for authority to acquire stock control of the Central of Georgia. The district court dismissed the action. This Court ordered the judgment of the district court vacated insofar as it relates to Sections 4, 5 and 9 of the Washington Job Protection Agreement, and instructed the district court to remand the proceeding to the Interstate Commerce Commission "with instructions to amend its report and order as necessary to deal with appellant's request that Sections 4, 5 and 9 be included as protective conditions, specifically indicating why each of these provisions is either omitted or included."

The order of this Court makes plain that the purpose of the Court in requiring the proceeding to be remanded to the Commission was to enable the Commission to consider the advisability of conditioning its grant of authority to the Southern Railway Company by including Sections 4, 5 and 9 of the Washington Agreement as protective conditions for the benefit of such employees as may lose their jobs or be transferred to less desirable jobs as a consequence of Southern Railway acquiring control of the Central of Georgia through the stock purchase.

Regardless of what the Commission's decision in this regard may be following remand of the case, the Commission's decision cannot reach or resolve the questions presented for review by this petition for certiorari. Petitioner's basic contention in the instant litigation is that

the Central of Georgia has assumed certain continuing contract obligations to the employees represented by petitioner. Those obligations stem from a collective bargaining agreement negotiated pursuant to the requirements of the Railway Labor Act. Those obligations can be brought to an end only by Central of Georgia and this petitioner agreeing to modify the collective agreement by pursuing the procedure prescribed by the Railway Labor Act, or by Central of Georgia obtaining authority from the Interstate Commerce Commission for a transaction under Section 5(2) of the Interstate Commerce Act.

Central of Georgia has not pursued either of these methods of freeing itself of its contract obligations to the employees. Hence, whatever the Commission may decide to do relative to the imposition of Sections 4, 5 and 9 of the Washington Agreement as protective conditions for those employees who may be adversely affected as a result of the Southern acquiring stock control of Central of Georgia, Central of Georgia's employees will continue to have employment rights under a collective agreement which rights we believe are entitled to protection by the instant proceeding.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 21,016.

SWITCHMEN'S UNION OF NORTH AMERICA,

Appellant,

versus

CENTRAL OF GEORGIA RAILWAY COMPANY and SOUTHERN RAILWAY COMPANY,

Appellees.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,

Appellants,

versus

CENTRAL OF GEORGIA RAILWAY COMPANY,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

(February 2, 1965.)

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

TUTTLE, Chief Judge: This appeal, while consolidated by the district court, really consists of three separate law suits, two of which, *BLE and BLF&E v. Central of Georgia Railway Company,* differ so materially from the third, *Switchmen's Union v. Central of Georgia and Southern Railway Company,* that the cases must be considered separately.

The two Brotherhood suits were filed simultaneously in the Middle District of Georgia against the Central of Georgia Railway Company alone. The complaints in those two cases simply alleged that at a time when a subsisting agreement was in effect between the Central of Georgia and its two groups of employees as to which the Brotherhoods were the bargaining representatives, the Central of Georgia unilaterally transferred all of its employees in certain yards from the Central of Georgia payroll to the payroll of the Southern Railway Company; that this changed rates of pay, rules and working conditions of its employees without compliance with Section 156 of Title 45 U. S. C. A. to the irreparable damage of the employees and that such conduct should be enjoined.

The Switchmen's Union complaint, brought, as noted above, against both Central of Georgia and Southern Railway Companies upon alleging similar facts, also relied on allegations that the two railroad companies were purporting to act by reason of an Interstate Commerce Commission order authorizing the purchase of controlling stock in the Central by the Southern; and that the order of the Interstate Commerce Commission did not authorize a consolidation of the several yards involved; that under an existing labor agreement known as "the Washington Agreement" no such consolidation could be undertaken except upon 90 days notice and an opportunity by the respective Brotherhoods to negotiate with relation to the employment conditions arising from such consolidation; that the attempted consolidation without compliance with the terms of the Washington Agreement violated the terms of the Interstate Commerce Commission order authorizing the acquisition of control by the Southern, thus giving a right to the affected employees to an injunction to maintain the status quo until the provisions of the

Washington Agreement dealing with the 90 day notice were complied with.

By reason of the fact that the Supreme Court has recently assumed jurisdiction in an appeal from a judgment by a three-judge district court in the Eastern District of Virginia, dealing with the same Interstate Commerce Commission order here pleaded in the suit filed by the Switchmen's Union, as a result of which the Supreme Court has directed the three-judge district court to remand to the Interstate Commerce Commission its said order with directions that the Commission "amend its report and order as necessary to deal with appellant's request that Sections 4, 5 and 9 be included as protective conditions, specifically indicating why each of these provisions is either omitted or included," * * * U. S. * * *, 33 L. W. 3208, we think it premature for this Court to pass upon the appeal in the *Switchmen's Union* case. The correctness of the trial court's determination in that case may well be determined by the action of the Interstate Commerce Commission in response to the expected mandate just referred to, and the further orders of the district court and possibly the Supreme Court thereafter.

In view of the fact that the *Brotherhood* cases against Central of Georgia, here on appeal, in no way relate to the Washington Agreement we deem it appropriate to deal with the appeal in that case, even though in doing so we have to consider the Interstate Commerce order which we have heretofore referred to. This order, entered upon the application of the Southern Railway System, authorized the Southern to acquire the controlling stock of Central. This occurred in a proceeding entitled "Southern Railway—Control—Central of Georgia Railway Company, Finance Docket No. 21,400, 317 I. C. C. 557 and 317 I. C. C. 729." This order of the Interstate Commerce Commission becomes significant in this case because, although

not pleaded by the appellant Brotherhoods in their complaints, it was introduced in evidence in support of a motion to dismiss by the Central of Georgia and the order of the trial court dismissing the complaints may be taken as orders of dismissal on motion for summary judgment in accordance with Federal Rules of Civil Procedure Rule No. 12(b).

The appellee, Central of Georgia Railway Company, defends its conduct in transferring its employees in the several yards in question to the Southern Railway Company on the ground that this was authorized by the I. C. C. order itself. It is contended that this amounted simply to a termination by Central of unneeded employees accompanied by an offer to them of employment by Southern. Thus, it was argued, Central was not guilty of changing the terms of any existing agreement with respect to rates of pay, rules or working conditions as prohibited without a Section 6 notice by the Railway Labor Act, but was merely dispensing with the services of unneeded employees.

A resolution of this appeal depends upon the correct solution of two questions. (1) Did the order of Interstate Commerce Commission authorize the consolidation or coordination of facilities which resulted in the termination of the employment of the Central employees; (2) If the order authorized this consolidation or coordination, did the termination violate Section 6 of the Railway Labor Act prohibiting unilateral change in "agreements affecting rates of pay, rules or working conditions" except upon notice and opportunity to negotiate with ultimate recourse to the Mediation Board?

As to the first question, the brief of the appellees offers us little help. Having treated all cases alike, the briefs do not discuss the precise question whether the

Interstate Commerce order, which on its face purports only to grant the right to Southern Railway Company to acquire the stock, and thus the control of Central of Georgia Railway Company, also permits the consolidation of yards belonging to the two related companies. Nevertheless, viewing the language of the I. C. C. report upon which the order is based, we conclude that the order authorized the Central to surrender its yards, and the operation thereof, to the parent company the Southern Railway Company. This action was clearly contemplated by all parties to the Interstate Commerce proceedings under the heading "Employees." In the report it is stated,

> "Applicant [Southern Railway Company] estimates that the proposed consolidation of Central's freight agencies, yards, shops, and accounting department into those of applicant will result in the elimination of between 814 and 824 jobs held by Central employees and 4 held by applicant's employees. * * *
>
> "Consummation of the proposed transaction unquestionably will result in substantial hardship to many employees and their families. However, we are not persuaded that the application should be denied for this reason. While the number of available jobs will be reduced, at least temporarily, the remaining jobs will be made more secure. In this connection, it is noteworthy that, without any coordination such as that planned, the average number of persons employed by Central has been reduced from 6,737 in 1945 to 3,421 in 1960. The future of all the employees of Central is far from bright unless this trend can be arrested. Affiliation of Central with applicant will strengthen its ability to render adequate and efficient service and to continue its operations on a sound financial basis. Some such affiliation appears necessary to avoid further deterioration in its earnings and competitive position and, possibly, insolvency."

In light of the foregoing language which clearly contemplates "coordination," a word well understood in the industry as involving the merging of facilities, see Section 2(a) Washington Agreement, we conclude that the first question must be answered in the affirmative. The order authorizing the Southern to acquire control of the Central authorized this consolidation or coordination of yards that brought about the notice of termination which the Brotherhoods here complain of.

As this Court has noted in *St. Louis, San Francisco & Texas Rwy. Co. v. Railroad Yardmasters of America, AFL-CIO,* 5 Cir., 328 F. 2d 749, it does not follow that every time a carrier takes unilateral action that may affect "rates of pay, rules or working conditions" then Section 6 must be invoked on the theory that the carrier is thus intending to effect a "change in agreements affecting rates of pay, rules or working conditions" which the parties here both agree can be accomplished only in the manner provided under Section 6 of the Act. The Central of Georgia Railway does not purport to and has not suggested an intention to make, a "change in the *agreements* affecting rates of pay, rules or working conditions." (Emphasis added.)

Relying, whether correctly or mistakenly, on the fact that a large number of jobs are no longer needed to be performed by its employees in light of the consolidation of facilities with the Southern and the assumption of the operations by the Southern it has, by bulletin, notified the affected employees that their services are no longer needed by it, but that they may be employed by the Southern in several capacities. If this conduct by the Central of Georgia is in violation of existing agreements, it can be contested under the provisions of the Railway Labor Act by following the grievance procedures to the Railway Adjustment Board

as in the processing of a "minor" dispute. As we stated in *St. Louis, SF & T Rwy. Co. v. Railroad Yardmasters, supra*, "In such a case a suit may not be filed in the courts until after the procedures provided for under the Act are complied with." 328 F. 2d 749, 752.

Although the district court's order of dismissal stressed the pendency of the three-judge case in the Eastern District of Virginia as the principal reason for denying relief here, and the issues before the court with respect to this Brotherhood appeal are not in any way affected by that case, the order of the trial court dismissing these complaints was nevertheless correct for the reasons we have stated. To summarize, we find that the Interstate Commerce Commission order of June 10th authorized the consolidation of the facilities of the Central of Georgia with the Southern, thus bringing about a reduction in force by the Central of Georgia; if such reduction in force violated any existing agreements between the Brotherhoods and the Central of Georgia, relief in such event would be by grievance procedures in the processing of a "minor" dispute under the Railway Labor Act. A violation of such agreements would not entitle the Brotherhoods to file a suit either for injunction or damages until such dispute had been fully processed and disposed of. The judgment of the trial court dismissing the two Brotherhood suits must be affirmed.

No final disposition can be made of the appeal of *Switchmen's Union v. Central of Georgia and Southern Railway Company* because the basis of their attack in the trial court is the Washington Agreement. In the three-judge district court they, as well as the Brotherhoods in the companion case which we dispose of in similar fashion today, *Brotherhood of Railway and Steamship Clerks, et al. v. Southern Railway Company and Central of Georgia*

Railway Company, No. 21023, filed suit to restrain the enforcement, operation or execution of the I. C. C. order by requiring the inclusion in the order of Sections 4, 5 and 9 of the Washington Agreement. The trial court declined to require such modification, *Railway Labor Executives' Assn. v. United States*, 226 F. Supp. 521. The Supreme Court, as stated above, vacated the order and remanded the case to the district court directing that it be sent back to the Commission for further consideration of these provisions of the Washington Agreement. Since, therefore, the order here litigated has been remanded to the Commission for further consideration it would be inappropriate for this Court to proceed further in the matter until full effect has been given to the Supreme Court's mandate. Since the issues remaining in the case following further action by the Commission should first be submitted to the trial court for its consideration, we vacate the judgment of dismissal in the *Switchmen's Union* case and remand it to the trial court for further proceedings not inconsistent with this opinion.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court dismissing the two Brotherhood suits in this cause be, and the same is hereby, affirmed; and that the judgment of dismissal in the *Switchmen's Union* case by and the same is hereby vacated and said causes remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellant, Switchmen's Union of North America recover one-half of costs on its appeal from appellees, Central of Georgia Railway Company and Southern Railway Company, and that appellants, Brotherhood of Locomotive Engineers, and others be condemned to pay the costs of their appeal, for all of which execution may be issued out of the said District Court.

February 2, 1965

Issued as Mandate: Mar. 15, 1965

ON PETITION FOR REHEARING.

(March 5, 1965.)

Before TUTTLE, *Chief Judge*, BELL, *Circuit Judge*, and WHITEHURST, *District Judge*.

PER CURIAM:

This petition for rehearing and motion for stay of the mandate presents nothing that was not contained in the original briefs of the appellants. The filing of such a motion is wholly unjustified.

The petition and motion are DENIED.

STATUTES INVOLVED.

Interstate Commerce Act.

Section 1(18) of the Interstate Commerce Act, 49 U. S. C., Section 1(18) is as follows:

No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall

engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Section 5(2)(a) of the Interstate Commerce Act, 49 U. S. C., Section 5(2)(a) is as follows:

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers

through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

Section 5(11) of the Interstate Commerce Act, 49 U. S. C., Section 5(11), provides as follows:

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or

municipal insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

Railway Labor Act.

Section 2, First of the Railway Labor Act, 45 U. S. C., Section 152, First provides:

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

SUPREME COURT, U. S.

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FILED
JUN 17 1965
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No. 160

Supreme Court of the United States

OCTOBER TERM, 1964

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN,
Petitioner,

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 1187

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN,
Petitioner,

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

The opinions of the courts below are adequately described, and the jurisdictional basis for the Petition adequately set forth, in the Petition, p. 2.

QUESTION PRESENTED

Whether the Order of the Interstate Commerce Commission in Finance Docket 21,400, *Southern Ry. Co.-Control-Central of Georgia Ry. Co.*, 317 I.C.C. 557 (1962), authorized Southern Railway Company and respondent Central of Georgia Railway Company to consolidate their railroad-yard operations at Macon and Atlanta, Georgia, and Chattanooga, Tennessee.

STATUTES INVOLVED

In addition to those sections of the Interstate Commerce Act printed in the Appendix to the Petition (pp. 28-31), Section 5(2)(f) of that Act, 49 U.S.C. § 5(2)(f), is also involved in this case. Section 5(2)(f) is set forth in Appendix A to this Brief, p. 17, *infra*.

STATEMENT OF THE CASE

The issue in this case turns entirely on the meaning of a particular order of the Interstate Commerce Commission, entered on December 3, 1962. It will therefore be appropriate to begin by summarizing the events that led up to the order in question, and the judicial proceedings to which it has given rise.

The case began on December 15, 1960, when Southern Railway Company filed an application with the Commission under Section 5(2) of the Interstate Commerce Act for authority to acquire stock control of respondent Central of Georgia Railway Company. Central intervened in support of this application, and Railway Labor Executives' Association, of which petitioner's officers were members and which acted on behalf of Southern's and Central's employees, including

members of petitioner, intervened in opposition. It will be helpful to have in mind a number of facts developed at the hearing on this application, facts that are not disputed by the instant Petition.

Central is a small railroad. For most of the last 32 years it has been controlled either by a receiver, a trustee in bankruptcy, a voting trustee, or stock speculators. It was subject to overwhelming competition from a number of surrounding major railroads. See *Southern Ry.-Control-Central of Georgia Ry.*, 317 I.C.C. 557, 560-62 (1962) (the Report of the I.C.C. in this case). Central had, in fact, become a marginal carrier and had been forced to give up necessary programs of equipment modernization and maintenance. *Id.* at 560. In spite of the fact that Central was not keeping pace with technological developments in the industry, unemployment on its lines was increasing 35% faster than the industry average, because of its reduced earnings.

Much of the hearings revolved around the economies through consolidation of duplicate facilities that the proposed stock acquisition would make possible. These economies were emphasized by Southern and Central as reasons in support of the application. The adverse effect on Central employees resulting from the planned consolidations was strongly urged by RLEA as reason for denying the application. In the alternative, RLEA asked that the proposed consolidations' effect on employees whose interests it represented be mitigated by the imposition, under Section 5(2)(f) of the Interstate Commerce Act, of an extensive system of labor-protective conditions designed to compensate adversely affected employees. In discussing the projected

modernizations, improvements, and consolidations, the Hearing Examiner mentioned, among others, the very steps of which petitioner now complains:

> "Central's yards at Atlanta, Macon, [and] Chattanooga . . . would be consolidated into Southern's more modern yards at those . . . points. . . ." R. 215.[1]

The Examiner then went on to detail the savings that would result from these yard consolidations. R. 217. After considering these and other financial benefits that the proposed transaction would produce, he recommended that it be approved as in the public interest.

The case then went before the Commission itself. Again the issues revolved around consolidations of facilities that the proposed acquisition of control would make possible, with the opposing labor organization emphasizing the allegedly injurious effect of these consolidations on the affected carriers' employees. The Commission issued its report approving the proposed transaction on November 7, 1962. It first noted that "the proposed transaction will result in improved service to the public and in the effectuation of substantial economies." 317 I.C.C. at 560; R. 177. It then listed the expected economies, including "consolidation of yard facilities. . . ." *Ibid.* It attached to its report, as Appendix I, excerpts from the Hearing Examiner's report, including the passage already quoted referring expressly to the consolidations placed in issue by the Petition herein. 317 I.C.C. at 570, 579; R. 196, 215. And, most important of all, the Commission thoroughly described the effects that the proposed transaction

[1] This citation is to the printed record in the Court of Appeals in this case, nine copies of which were filed with the Petition.

would have on Southern's and Central's employees. It said:

"'Employees.—Applicant estimates that *the proposed consolidation* of the Central's freight agencies, yards, shops and accounting department into those of applicant will result in the elimination of between 814 and 824 jobs held by Central employees and 4 held by applicant's employees. The association questions this estimate, but the number of jobs to be affected by the proposed consolidations is a matter under the control of applicant and concerning which its officers have more accurate information. Accordingly, we accept its estimate as substantially correct. We recognize, however, as pointed out by the association, that the number of employees who would be affected, no doubt, would exceed the number of jobs abolished, because of the so-called bumping process under which, through the exercise of seniority rights established by collective bargaining agreements, an employee whose position is abolished may displace another, who in turn may displace an employee junior on the seniority roster involved, and so on.

"Consummation of *the proposed transaction* unquestionably will result in substantial hardship to many employees and their families. However, we are not persuaded that the application should be denied for this reason. While the number of available jobs will be reduced, at least temporarily, the remaining jobs will be made more secure. In this connection, it is noteworthy that, without any coordination *such as that planned*, the average number of persons employed by the Central has been reduced from 6,737 in 1945 to 3,421 in 1960. The future of all the employees of the Central is far from bright unless this trend can be arrested. Affiliation of the Central with applicant will strengthen its ability to render adequate and

efficient service and to continue its operations on a sound financial basis. Some such affiliation appears necessary to avoid further deterioration in its earnings and competitive position and, possibly, insolvency." 317 I.C.C. at 562; R. 180-81 (emphasis supplied).

With these consolidations and labor effects in mind, the Commission found that the proposed acquisition would be in the public interest and issued an order approving it. This order, issued on December 3, 1962, expressly incorporated by reference the report of November 7, 1962, R. 244, and authorized the consummation of the proposed transaction "in the manner and upon the terms and conditions in the report aforesaid found just and reasonable . . . ." R. 245.

The approval thus granted by the Commission was conditioned on a thorough-going system of conditions designed to compensate employees who would be adversely affected by the proposed consolidations. The conditions imposed included, in summary, the following:

(1) Employees displaced or dismissed by reason of the acquisition will receive full monetary compensation for four years after the effective date of the order approving the transaction, or for the period of their service prior to that date, if that period is less than four years.

(2) This compensation will include moving expenses and losses on the sale of homes at less than fair value.

(3) Compensation will also be made for any loss of fringe benefits not shared by all similarly situated employees.

(4) The compensation thus described is a minimum; any employee who at the end of the four-year protective period shall have received less compensation than the total amount he would have received under the Washington Agreement, a private contract not here involved, shall thereafter continue to receive additional compensation until the difference shall have been paid.

(5) At RLEA's request, any dispute over the application of these conditions will be subject to compulsory and binding arbitration.

RLEA petitioned for reconsideration of the order of December 3, 1962, but on June 10, 1963, the petition was denied in all respects here pertinent, 317 I.C.C. 729, and on June 14, 1963, the order authorizing the instant transaction became final.[2] Promptly on receipt of the Commission's second order, Southern and Central proceeded to put into effect the planned consolidations. On June 17, 1963, they consolidated the Southern and Central yard facilities at Macon, Atlanta, and Chattanooga. Central employees at those yards, as expected, were offered employment with Southern, with a consequent loss of seniority. Employees monetarily injured by this action are now

[2] Prolonged litigation, not yet finally resolved, ensued concerning the scope of the labor-protective conditions. These conditions were upheld against challenge by RLEA, Railway Labor Executives' Ass'n v. United States, 226 F. Supp. 521 (E. D. Va. 1964), but on appeal this Court summarily remanded the case to the Commission for consideration of whether to include in its conditions certain provisions of the private contract (not here involved) known as the Washington Agreement. 379 U.S. 199 (1964). This phase of the case is now before the Commission on remand, and as of this writing the Commission had not yet taken any action thereon.

being compensated pursuant to the labor-protective conditions that the Commission had imposed. Southern and Central have to date paid affected employees, including members of petitioner union, over $4 million under these conditions.

Meanwhile, on June 26, 1963, petitioner brought this suit in the United States District Court for the Middle District of Georgia against Central. It alleged that it was a party to a collective-bargaining agreement with Central executed on January 1, 1954. It then claimed that the yard consolidations described above were an attempt to change rates of pay, rules, and working conditions of employees respresented by it without following the procedures required by Sections 2, Seventh and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, Seventh, 156. Petitioner asked the District Court to issue a mandatory injunction undoing the already consummated yard consolidations, and restoring in all respect the *status quo ante* June 17, 1963. R. 43. After transfer to the Northern District of Georgia, petitioner's complaint was dismissed by that Court.

On appeal, the Court below affirmed unanimously. In an opinion by Chief Judge Tuttle, the Court held, first, that the Commission orders had not been limited, as claimed by petitioner, to a mere authorization for Southern to acquire legal title to Central stock. The Court was of the opinion that the Commission's orders, when considered in context, also authorized consolidation of the yards in question. The Court held, further, that even if the Central's conduct thus authorized by the Commission were a violation of existing collective-bargaining agreements, the case was still merely a "minor dispute," within the exclusive primary jurisdiction of the National Railroad Adjustment Board

under Section 3, First (i) of the Railway Labor Act, 45 U.S.C. § 153, First (i). This Petition followed.[3]

ARGUMENT

Petitioner does not claim any conflict among the circuits, and none exists. The Petition attempts to portray this case as involving issues under Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), and decisions of this Court requiring permission from the Interstate Commerce Commission for certain railroad consolidations. Pet., pp. 3, 13-14. In fact, no such issues are presented. The issue in this case is simply whether yard consolidations in three cities were authorized by a particular order of the Commission. Petitioner's case depends wholly on the thesis that there was no such authorization, and the Petition implicitly concedes that if there was such authorization the Court below was correct in affirming dismissal of the complaint. Thus, no large issues of statutory construction are presented. The questions in this case are of importance only to the parties. Obviously the construction of a single Interstate Commerce Commission order does not even approach the magnitude necessary to make a claim on this Court's time. Even if the Court of Appeals had been wrong (which it was not), therefore, there would be no occasion to grant certiorari in this case. Further, the Court of Appeals was clearly correct, as can be demonstrated in brief compass.

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[3] The Court's opinion also disposed, on similar grounds, of the appeal in a companion case brought by the Brotherhood of Locomotive Engineers. Certiorari has not been sought in this case. Two other cases arising out of Southern's acquisition of Central were also before the Court of Appeals. One was decided by the same opinion as disposed of the instant case, and one was dealt with in a separate opinion. See Brotherhood of Ry. & S.S. Clerks v. Southern Ry. Co., 341 F.2d 217 (5th Cir. 1965). Certiorari has likewise not been sought in these latter two cases.

1. The Interstate Commerce Commission's Order of December 3, 1962, Authorized the Yard Consolidations in Question Here.

We start with the proposition that the purpose of Section 5(2) of the Interstate Commerce Act, under which the order at issue here was entered, was to encourage certain "transactions" by rail carriers that would result in increased economy and efficiency in the national transportation system. As this Court recently remarked,

> " 'The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act, enacting § 5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system.' *County of Marin* v. *United States*, 356 U.S. 412, 416." *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173 (1961).

At the same time, it was recognized that the "transactions" sought to be encouraged would likely have an adverse effect on employees. Section 5(2)(c)(4) requires that the Commission, in deciding whether a proposed "transaction" is in the public interest, take into account adverse effects on employees. And Section 5(2)(f) requires the Commission, in the event of approval, to impose upon the "transaction" conditions for the protection of affected employees. The type of "transaction" involved here is a stock acquisition. See Section 5(2)(a)(i), 3d clause.[4] As part of this "transaction," certain yard consolidations have been put into

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[4] This clause reads: "It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—(i) . . . for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise . . . ."

effect, certain employees, including members of petitioner, have been displaced or dismissed, and compensation is being paid pursuant to the Commission's order. The Congress deemed it necessary for the Commission to approve and authorize the acquisition by one carrier of control of another, because the Congress realized that in exercising control as a majority stockholder, such carrier would have the right to exercise those rights of corporate management which are inherent and legal attributes of majority control of a corporation. Section 5(2)(f) was therefore made by Congress to apply to acquisitions of control as well as to consolidations or mergers.

Petitioner's argument is that the "transaction" approved was strictly limited to an acquisition by Southern of stock in Central. It included nothing more, according to Petitioner, and the carriers must return to the Commission, make another application, conduct additional hearings, and probably bear the burden of further litigation, if the national transportation system is to get any economic benefit out of the stock acquisition. To support this narrow and strained construction, petitioner points to the language of the order of December 3, 1962, approving "the acquisition by the Southern Railway Company of control of the Central of Georgia Railway Company . . . through ownership of a majority of the capital stock of the Central of Georgia Railway Company. . . ." Pet., p. 4. The very passage quoted by petitioner goes on, however, to add that the acquisition shall be made "in the manner and upon the terms and conditions in the report aforesaid [the report of November 7, 1962] found just and reasonable . . . ." *Ibid.* The order also expressly incorporates by reference this entire report. R. 244.

And the report, as already explained at length, pp. 3-7, *supra*, discussed in detail the economies and consolidations that would follow the proposed stock acquisition. Indeed, it was these economies, including the very yard consolidations here complained of, that caused the Commission to approve the instant "transaction" in the public interest.

Petitioner's position, furthermore, makes nonsense of the discussion of employee effects in the Commission's report, and of its careful prescription of conditions to compensate affected employees. A mere stock acquisition, without more, does not displace any employee, or cause anyone's dismissal. These effects result from consolidations and economies made possible by the stock acquisition. If the Commission's authorization had been limited to the bare acquisition, there would have been no occasion to prescribe employee protection. And under petitioner's theory, all the extensive litigation over the scope of this protection, including this Court's decision in *Railway Labor Executives' Ass'n* v. *United States*, 379 U.S. 199 (1964) (per curiam), is merely a sterile and nugatory exercise in futility. There is no need to litigate over protection for employees affected by consolidations, petitioner would say, for no consolidations have ever been authorized.

A reading of the Commission's report reinforces the conclusion that the consolidations were authorized. Nowhere does it limit the "transaction" to a bare acquisition of capital stock. It repeatedly refers to the "transaction" as encompassing consequent economies and consolidations, including the three yard consolidations that produced this case. *E.g.*, 317 I.C.C. at 562;

R. 180-81. As the United States District Court for the Eastern District of Virginia said of this "transaction,"

> "The Commission, in approving the *transaction,* was fully advised of the proposed consolidation of Central's freight agencies, *yards,* shops and accounting department into those of Southern, together with the *resultant job losses* entailing substantial hardship to many employees and their families. In the alleviation of these hardships the Commission imposed conditions for the protection of the employees thus affected . . . ." *Railway Labor Executives' Ass'n* v. *United States,* 226 F. Supp. 521, 522 (E. D. Va.), *vacated and remanded per curiam on other grounds,* 379 U.S. 199 (1964) (footnote omitted; emphasis supplied).

The fact is that the word "transaction," as commonly used and as employed in Section 5(2) of the Interstate Commerce Act, refers to all "the many different elements involved in mergers, leasing agreements, pooling arrangements, or joint operations," *Texas & N.O.R. Co.* v. *Brotherhood of R.R. Trainmen,* 307 F. 2d 151, 159 (5th Cir. 1962), *cert. denied,* 371 U.S. 952 (1963), necessarily including railroading economies that will be an integral part of the "transaction."

It is thus clear that the yard consolidations involved in the case at bar were authorized by the Commission. Given this premise, it follows inevitably—and the Petition appears to concede, see p. 15—that respondent Central of Georgia had a right to consolidate its yards at Macon, Atlanta, and Chattanooga with Southern's facilities there, and to discharge employees in order to make these consolidations, notwithstanding any pro-

visions of the Railway Labor Act. Section 5(11) of the Interstate Commerce Act provides that the Commission's authority under Section 5 is "plenary and exclusive," and that

> "any carriers . . . participating in a transaction approved or authorized under the provisions of [Section 5] . . . shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for . . . ."

In other words, Central, having been authorized by a Section 5 order to consolidate these three railroad yards with Southern, was *pro tanto* relieved from any prohibitions or requirements that might otherwise be imposed by the Railway Labor Act. See *Schwabacher* v. *United States,* 334 U.S. 182 (1948); *Brotherhood of Locomotive Engineers* v. *Chicago & N. W. Ry. Co.,* 314 F. 2d 424 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963).

2. Certiorari Should Also be Denied Because the Court of Appeals' Decision is Supportable on an Alternative Ground.

Even if petitioner's construction of the Commission's order of December 3, 1962, were correct, and even if this question were of national importance, this case would still not be an appropriate one for exercise of the certiorari power. For the Court of Appeals' decision affirming dismissal of the complaint is also supportable on an alternative ground involving only a routine application of settled Railway Labor Act doctrine.

Assuming that the Railway Labor Act applies to these consolidations, nothing was done to warrant invocation of Section 6 of that statute. That provision applies only to "major disputes," involving unilateral attempts to change collective-bargaining agreements. Central has not tried and does not desire to make any such change in its agreement of January 1, 1954, with petitioner. The agreement remains valid and fully applicable in respect of employees of Central represented by petitioner. Central has simply discharged some of those employees as part of a consolidation program, at the same time seeing to it that the discharged workers had an opportunity for employment with Southern. If work has thus been improperly "contracted out," or if seniority rights have been adversely affected, there has been, at worst, merely a violation of the agreement of January 1, 1954, giving rise to a "minor dispute." Such disputes, under familiar principles, are within the exclusive primary jurisdiction of the National Railroad Adjustment Board. See, *e.g., Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (1957); *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711 (1945); *St. Louis, S.F. & T. Ry. Co.* v. *Railroad Yardmasters*, 328 F. 2d 749 (5th Cir.), *cert. denied*, 377 U.S. 980 (1964).

CONCLUSION

The decision below is plainly correct. In addition, this case involves no conflict among the circuits or important issues of statutory construction. It concerns only the construction of a particular order of the Interstate Commerce Commission, or, in the alternative, the application of traditional Railway Labor Act

principles to particular facts. Certiorari should be denied.

Respectfully submitted,

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June 17, 1965

APPENDIX A

"(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this Chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." 49 U.S.C. § 5(2)(f).

SUPREME COURT, U. S.

FILED

JUL 31 1965

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 160.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
an unincorporated association,
Petitioner,

v.

CENTRAL OF GEORGIA RAILWAY COMPANY,
a corporation,
Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

The brief filed on behalf of Central of Georgia Railway Company in opposition to the Brotherhood's petition for a writ of certiorari acknowledges that the application filed by Southern Railway Company with the Interstate Commerce Commission on December 15, 1960, sought authority from the Commission merely to purchase a block of the common stock of the Central of Georgia Railway Company with a view to acquiring control over the management of the Central of Georgia Railway. In respondent's "Statement of the Case," at page 2 of its brief, respondent says:

> "The case began on December 15, 1960, when Southern Railway Company filed an application with the Commission under Section 5(2) of the Interstate Commerce Act for authority to acquire stock control of respondent Central of Georgia Railway Company."

Again at page 10 of its brief respondent says:

"The type of transaction involved here is a stock acquisition."

Yet the gist of respondent's argument opposing the granting of certiorari is that in the course of hearings held by the Hearing Examiner, Southern Railway's intentions with respect to consolidating its yard and terminal facilities with those operated by the Central of Georgia Railway were described by Southern Railway's witnesses; and, in addition, the Examiner, and later the Commission, gave consideration to the effects that "the proposed transaction" * would have on Southern's and Central's employees, and, according to respondent, the Commission conditioned its approval of Southern's application by imposing "a thorough-going system of conditions designed to compensate employees who would be adversely affected by the proposed consolidations." †

What Southern Railway's application to the Commission disclosed regarding the effect that its "proposed transaction" with the Central of Georgia Railway Company would have on the employees was stated as follows:

"(v) *Employee Protection.* The proposed transaction will not have any adverse effect upon employees of applicant. Applicant is unable to say at this time just what effect the proposed transaction will have on employees of Central, but it is possible that certain employees of Central might be adversely affected." (Page 13 of Application of Southern Railway Company.)

The respondent, on the basis of these considerations, arrives at the conclusion that the Commission's order

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* Page 4 of respondent's brief.

† Page 6 of respondent's brief.

actually authorized Southern Railway to consolidate its yard and terminal facilities with the yard and terminal facilities owned and operated by the Central of Georgia Railway. Says the respondent at page 13 of its brief:

> "It is thus clear that the yard consolidations involved in the case at bar were authorized by the Commission."

We suggest that the respondent's explanation of the purpose and the effect of the evidence presented to the Commission disclosing Southern Railway's plans for the consolidation of switching yards and terminal facilities, and the general effect that such consolidations would have on Southern Railway employees and on Central of Georgia employees, is not a correct explanation of the purpose such evidence was intended to serve. Southern Railway has, in fact, proceeded since the issuance of the Commission's order on December 5, 1962, as if Southern Railway and the Central of Georgia Railway had applied to the Commission under Section 5(2)(a) for authority "to consolidate or merge their properties or franchises," and the Commission had in fact approved an application of that nature.

If the proceeding before the Commission was for the purpose that is now claimed by the respondent, the proceeding was in part a deception and ought not receive judicial approbation, such as was accorded it by the Court of Appeals for the Fifth Circuit. We say the proceeding tended to be deceptive because Southern Railway's application to the Commission does not disclose that it sought authority to do more than acquire stock control of the Central of Georgia Railway Company. Furthermore, the introduction of evidence disclosing Southern Railway's plans for the consolidation of yard and terminal facilities served an essential purpose, but it was a purpose other

than that attributed to it by the respondent. That purpose was to justify Southern Railway's desire to acquire control over the management of the Central of Georgia Railway Company. When one railroad corporation seeks to acquire control over the management of another railroad corporation through the ownership of corporation stock, the Congress has put upon the acquiring corporation the burden of demonstrating that the establishment of a single management over two railroad systems is consistent with the public interest.

There is manifestly not one but several methods by which the establishment of a single management over two railroad systems—particularly two competing systems—could bring about changes in their methods of operation that would be either consistent with or beneficial to the public interest. The consolidation of yard and terminal facilities of the two systems could, under certain circumstances, be one such method. Hence, such plans as Southern Railway had for consolidating or merging its yard and terminal facilities with those operated by the Central of Georgia Railway could tend to justify establishing a single management over the operation of the two railroads. Testimony on this subject would therefore provide support for Southern Railway's application to the Commission for permission to acquire a controlling block of Central of Georgia Railway Company stock. The actual consolidation or merger of the yards and terminal facilities of the two carriers is a development that might follow, for good reason, long after permission to establish a joint or single management had been obtained from the Commission.

The respondent commits a second error when it contends, in effect, that the fact that the Commission imposed protective conditions for the benefit of employees proves

that the Commission authorized Southern Railway to consolidate or merge its yard and terminal facilities with the yard and terminal facilities owned and operated by the Central of Georgia Railway Company. The respondent says at page 12 of its brief—

> "If the Commission's authorization had been limited to the bare acquisition, there would have been no occasion to prescribe employee protection."

Such reasoning is patently unsound. If the managements of two railroad systems that have been competing for business over substantially the same geographical area become subject to one management, there is a variety of ways by which economies in railroad operations could be effected, with a resulting shrinkage of jobs, without the railroads consolidating or merging their yard switching and terminal facilities or without abandoning lines of track or making other changes in operating methods for which specific authority from the Commission need first be obtained under Section 1(18), or Section 5(1), or Section 5(2) of the Interstate Commerce Act.

For example, office facilities and office personnel of the two carriers could be combined. Service shops and the shop crafts could be combined and streamlined into more efficient arrangements. The practice of competing for traffic in communities served by both carriers could be moderated by reducing the number of trains in operation without detracting from the essential service needed by a community or without running afoul of the prohibitions contained in Section 5(1) of the Interstate Commerce Act.*

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* Section 5(1) requires carriers to obtain from the Commission approval of agreements for the pooling or division of traffic, or of service, before such agreements may be made effective.

In all such undertakings there is virtual certainty that there will be a reduction in the number of persons employed or that there will be a shifting of their places of employment, and, hence, there will be occasion to impose protective conditions for the benefit of employees. It is doubtlessly due to such considerations that the Congress was persuaded to enact paragraph (f) of Section 5(2) of the Interstate Commerce Act, with the result that the Commission is required to condition its approval of an application by one carrier to acquire control over another carrier, through ownership of its stock, by imposing upon the carrier's plan "a fair and equitable arrangement to protect the interests of the railroad employees affected."

Hence, the respondent is simply in error when it asserts that the fact that the Commission imposed protective conditions for the benefit of employees at the time that it approved Southern Railway's application is proof that the Commission also authorized the two carriers "to consolidate or merge their properties or franchises."

In light of the contention that the Central of Georgia Railway has asserted throughout this litigation—that contention being that the Commission not only authorized Southern to acquire a controlling interest in the stock of the Central of Georgia Railway Company but that the Commission also granted Southern authority under Section 5(2)(a) of the Interstate Commerce Act to consolidate or merge its yard and terminal facilities with the yard and terminal facilities owned by Central of Georgia—one question begs for answer.

That question is this: What purpose or motive caused Southern Railway to limit the application it filed with the Commission to obtaining authority merely to purchase a controlling interest in the stock of Central of Georgia Railway Company?

If Southern Railway wanted greater advantages or greater freedom of action in assimilating and absorbing the Central of Georgia railway system into its own railway system than could legitimately be accomplished by acquiring control, through ownership of stock, of Central of Georgia Railway Company, why did not Southern Railway's application to the Commission set forth frankly and forthrightly its desire and its plans to consolidate or merge its railroad properties and franchises with similar facilities and franchises owned by the Central of Georgia Railway? The authority that the Commission's order granted to Southern Railway, to the extent that any authority is specifically spelled out by the order, reads as follows:

> "It is further ordered, that, subject to conditions set forth in said report, as amended by the immediately preceding paragraph hereof, the acquisition by the Southern Railway Company of control of the Central of Georgia Railway Company and of the latter's common carrier subsidiaries, through ownership of a majority of the capital stock of the Central of Georgia Railway Company, in the manner and upon the terms and conditions in the report aforesaid found just and reasonable, be, and it is hereby, approved and authorized:"

The question that Southern Railway has never answered, does have an answer. We suggest that the answer is that Southern Railway followed the path of least public resistance to its objectives. It confined the application that it filed with the Commission to a statement of the *minimum objective* for which it needed Commission approval. In that manner the burden of justifying its objectives was kept to a minimum. Public interest in the transaction, and employee opposition to the transaction, was only mildly aroused by Southern's declaration that the only authority that it sought from the Commission was authority to pur-

chase a block of common stock of the Central of Georgia Railway.

We suggest that not only the employees' welfare but also the public interest as well will be better served if the Court grants certiorari in the instant case and rules that when a carrier seeks authority from the Interstate Commerce Commission to acquire control in any form over the management, or over property and franchises of another carrier, the Interstate Commerce Act contemplates that the carrier's application to the Commission shall contain a full disclosure of the carrier's intentions, and the authority that the carrier seeks from the Commission shall be spelled out with particularity. Had these requirements been observed in the instant case, Southern Railway's application to the Commission would have disclosed to the organizations representing the Central of Georgia's employees, and to the public, the fact that the two carriers had developed plans that were ready for execution, pursuant to which Central of Georgia Railway would cease performing its yard switching services at Atlanta, at Macon, and at Chattanooga, and that it would discharge its employees working at those terminals.

CONCLUSION.

The petitioner prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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